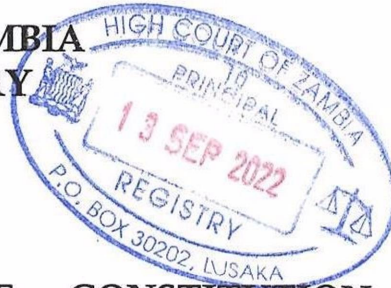


**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Constitutional Jurisdiction)



2022/HP/1327

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA,
CHAPTER 1, VOLUME 1 OF THE LAWS OF
ZAMBIA**

AND

**IN THE MATTER OF: ARTICLE 1(2), (3) AND (5) OF THE
CONSTITUTION OF THE REPUBLIC OF
ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016**

AND

**IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF
THE REPUBLIC OF ZAMBIA AS AMENDED BY
ACT NO. 2 OF 2016**

AND

**IN THE MATTER OF: ARTICLE 52 (4) OF THE CONSTITUTION
AS AMENDED BY ACT NO. 2 OF 2016**

AND

**IN THE MATTER OF: ARTICLE 72(4) OF THE CONSTITUTION
OF THE OF THE REPUBLIC OF ZAMBIA AS
AMENDED BY ACT NO. 2 OF 2016**

AND

**IN THE MATTER OF: THE DECISION OF THE RETURNING
OFFICER OF THE ELECTORAL COMMISSION
OF ZAMBIA TO REJECT THE NOMINATION
OF JOSEPH MALANJI THE PATRIOTIC FRONT**

PARLIAMENTARY CANDIDATE FOR
KWACHA CONSTITUENCY ON THE 25TH
AUGUST, 2022 WHO MET THE
QUALIFICATIONS AND PROCEDURAL
REQUIREMENTS SPECIFIED FOR AN
ELECTION THAT OFFICE

AND

IN THE MATTER OF: THE DECISION OF THE RETURNING
OFFICER OF THE ELECTORAL COMMISSION
OF ZAMBIA TO REJECT THE NOMINATION
OF BOWMAN CHILOSHA LUSAMBO THE
PATRIOTIC FRONT PARLIAMENTARY
CANDIDATE FOR KWACHA CONSTITUENCY
ON THE 25TH AUGUST, 2022 WHO MET THE
QUALIFICATIONS AND PROCEDURAL
REQUIREMENTS SPECIFIED FOR AN
ELECTION TO THAT OFFICE

BETWEEN:

JOSEPH MALANJI
BOWMAN CHILOSHA LUSAMBO

1ST PETITIONER
2ND PETITIONER

AND

THE ELECTORAL COMMISSION OF ZAMBIA
THE ATTORNEY GENERAL

1ST RESPONDENT
2ND RESPONDENT

CORAM: HON MR JUSTICE M. D. BOWA, HON MRS JUSTICE S. KAUNDA NEWA AND HON MRS JUSTICE C. LOMBE PHIRI IN CHAMBERS THIS DAY OF 13TH SEPTEMBER, 2022

For the Petitioners: Mr. M. Zulu, Mr. J. Zimba, Mr. Terbo – Makebi Zulu Advocates
Mr. T. Ngulube, Mr. S. Chipompela – Tutwa S Ngulube & Co.
Mr. J. Chirwa – Ferd Jere & Co

For the 1st Respondent: Mrs. T. Phiri and Mr. M. Bwalya – In House Counsel Electoral Commission of Zambia

For the 2nd Respondent: M. Muchende S.C. (Solicitor General) & J. Simachela (Chief State Advocate), C. Mulonda (Principal State Advocate). N. Mwiya (Assistant Senior State Advocate)

RULING

1. BACKGROUND

1.1 This Ruling consider two applications. A preliminary issue raised by the 2nd Respondent; and an application for suspension and or stay of the by elections for the Kabushi and Kwacha Constituencies slated for 15th September, 2022.

1.2 The 2nd Respondent filed into Court a Notice of Motion to Raise Preliminary Issues pursuant to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court of England and Wales (Whitebook) 1999 Edition as read with Articles 52 (4) and 128 (1)(4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016. It was stated in the Notice that the 2nd Respondent sought to raise the following issues:

- i. Whether the Petition filed by the Petitioners is an Election Petition under Regulation 19 (7) of the Electoral Process (General) (Amendment) Regulations, 2021.
- ii. Whether the Honorable Court has jurisdiction to determine this Petition in the absence of any challenge of the nominations of successful candidates for the Kwacha and Kabushi Constituencies by a third party in line with Article 52 (4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016
- iii. Whether the Honourable Court has jurisdiction to interpret the Constitution of Zambia in light of Article 128 (1) (a) of the Constitution of Zambia (Amendment) Act No.2 of 2016.
- iv. Whether this action is not an abuse of Court process by reason of duplicity as the issues canvassed in the Petition are similar to those brought before the Constitutional Court, in particular reliefs (a), (b) and (d) which are founded on Constitutional interpretation.
- v. Whether an administrative decision of a public body, in this case the 1st Respondent can be impugned by way of a Petition instead of by way of Judicial Review.

- vi. Whether this is not a proper case to dismiss with costs to the 2nd Respondent for want of jurisdiction.

1.3 The Notice by the 2nd Respondent to raise the preliminary issues was accompanied by an affidavit and combined list of authorities and skeleton arguments. The 1st Respondent also filed in arguments in support of the 2nd Respondent's Notice. On the other hand the Petitioners filed an affidavit in opposition and combined list of authorities and skeleton arguments.

2. 2ND RESPONDENTS CASE

2.1 The affidavit in support of the Notice of Motion to raise preliminary issues was deposed to by the Solicitor General, Mr. M. Muchende S.C. In summary he first averred to the fact that the Petitioners had filed a Petition before this Court on 30th August. The reliefs sought by the Petitioners were itemized in the affidavit as per the Petition before the Court. It was further averred that the Deponent was of the belief that the Petition filed by the Petitioners was not an election petition as provided for under Regulation 19 (7) of the Electoral Process (General) (Amendment) Regulations, 2021. It was also averred that a perusal of the reliefs suggests that the nominations of the successful candidates for Kwacha and Kabushi Constituencies held on 25th August, 2022 have not been challenged. It was stated that the Court was being invited to interpret the Constitution. Furthermore, it was deposed to that the action is an abuse of the Court process by reason of duplicity as the issues canvassed in the Petition are similar to those brought before the Constitutional Court, in particular the reliefs under (a), (b) and (d),

which are founded on Constitutional Interpretation. It was finally stated that an administrative decision of a public body, in this case the 1st Respondent, cannot be impugned by way of Petition instead it ought to be by way of Judicial review.

2.2 In the arguments in support of the application a brief background of the case was provided which requires no repetition as it is as it was averred to in the affidavit.

2.3 Firstly the question as to **whether the Petition by the Petitioners is an election petition** was addressed. In that regard it was submitted that Regulation 19 (7) of the Electoral Process (General)(Amendment) Regulation 2021, Statutory Instrument 39 of 2021 provides that

“The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution”

2.4 It was submitted that the Petition filed by the petitioners does not qualify as an election petition as required by the Regulations and must be dismissed.

2.5 On the issue of **want of jurisdiction for the Honourable Court to determine this Petition in the absence of any challenge of the nominations of candidates by a third party** it was submitted that the words *“a person may challenge the nomination of a candidate”* under Article 52 (4) of the Constitution

presupposes that it is a third party who is aggrieved by the nomination of a candidate who can file an election petition under Article 52 (4). In aid of this submission the case of **Mwanyinda Wamunyima v Walusa Mulaiki (2021/HP/0623)** was relied upon. The quoted portion spoke to the time limitation attached to the petition process under Article 52. It was stated in that case that the Electoral Rules and Regulations were enacted for expediency and include processes that may arise in the pre-election period. Further, the case of **Munir Zulu and Pilila Gertrude Mwanza (2021/CCZ/0029)** was cited. It was submitted that in that case the Petition was issued pursuant to 52(4) of the Constitution in relation to the Respondent who was alleged not to have a Grade 12 certificate.

2.6 It was submitted that there is no provision of law that allows a rejected candidate to challenge a decision of the returning officer under Article 52(4) of the Constitution as read with Regulation 19(7) of the Electoral Process (General) Amendment Regulations of 2021. It was further argued that the Court is not allowed to make legislation as this is the preserve of the Legislature. It was submitted that until Article 52 (4) is amended there is no immediate remedy to the Petitioners. Furthermore, it was stated that in the absence of a challenge by a third party as was in the case of **James Mwananyanda v Walusa Mulaiki** and **Munir Zulu v Pilila Gertrude Mwanza** the Court has no jurisdiction to entertain the Petition of the Petitioners in its current form or grant the reliefs so sought. It

was averred that this is more so as the reliefs sought by the Petitioners require the Court to make interpretations of the Constitution, which this Court has no jurisdiction to do. It was stated that the only way the Petitioners could challenge the decision of the 1st Respondent is by way of judicial review. It was submitted that on this account the matter ought to be dismissed with costs.

2.7 Turning to the issue of **want of jurisdiction by the Honourable Court to interpret the Constitution of Zambia** it was submitted in main that the authoritative provision of the Constitution is Article 128 (1)(a). It was submitted that three of the five reliefs sought were seeking an interpretation of the Constitution. Further that the remaining two reliefs were dependent on the other three that seek the Court to interpret the Constitution. The Court was invited to take judicial notice of relief (d) to the effect that the Petitioners are eligible to contest the elections in the two constituencies has already been determined by the Constitutional Court in exercising its powers to interpret the Constitution. The finding of the Constitutional Court in the case of **Joseph Malanji and Bowman Lusamabo v Attorney General and Electoral Commission of Zambia (2022/CCZ/0018)** regarding Article 72 (4) was quoted. Further reference was made to the Supreme Court's decision regarding the jurisdiction of the Constitutional Court in the case of **Hakainde Hichilema v the Attorney General (Appeal No.4/2019)** wherein the portion quoted stated that the

Constitutional Court has the mandate to interpret the entire Constitution. It was finally stated in this regard that this Court has no jurisdiction to venture into the interpretation of the Constitution and therefore has no jurisdiction to hear and determine this matter.

2.8 In relation to **impugning an administrative decision of a public body by way of a petition instead of judicial review** it was submitted that the 1st Respondent is a public body that exercises public functions and is therefore amenable to judicial review. The case of **Rodgers Chibwe v Kasempa District Council [2015] ZR Vol 1 279** was relied upon to demonstrate this argument. It was submitted that the functions of the 1st Respondent are as provided for under Article 229. That among these is the conducting of elections. It was submitted that in that regard the 1st Respondent was a public body whose decisions are amenable to judicial review. It was further submitted that the decision of the returning officer, in casu, is administrative in nature therefore it should be subjected to judicial review. It was submitted that the decision should have been questioned by way of judicial review and not by petition.

2.9 Regarding whether the **action is an abuse of the Court process** Order 18 rule 19 of the Rules of the Supreme Court of England (Whitebook) 1999 was quoted. Further the case of **Bampi Aubrey Kapalasa and Joseph Busenga v the Attorney**

General (CCZ/2021/0011) was relied upon to demonstrate that where there is an abuse of the Court process the Court has jurisdiction to dismiss the action. It was submitted that the conduct of the Petitioners in this matter amounted to an abuse of the Court process. The case of **BP Plc v Interland Motors et al (2001) ZR 37** was cited to show that a party to a dispute should not be allowed to litigate in scattered and piecemeal manner. Further, reference was made to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172** to show that the Court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. Furthermore, it was submitted that in the cases of **Mundia Sikatana v Attorney General [1982] ZR 109**, **BP Plc v Interland Motors Limited [2001] ZR 37** and **Kelvin Hang'angu (a firm) v Webby Mulubusha [2008] 2 ZR 82** it was held that:

“ The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermine each other from two or more different judges over the same subject matter”

2.10 It was submitted that the likelihood of the Court being brought into disrepute is high due to the multiplicity of actions.

2.11 In concluding the arguments it was submitted that the Court had no jurisdiction to determine the Petition in the absence of a challenge of the nominations of candidates for the Kwacha and Kabushi

Constituencies in line with Article 52 (4) of the Constitution of Zambia.

2.12 It was also submitted that the Court has no jurisdiction to interpret the Constitution of Zambia in light of Article 128 (1)(a) of the Constitution of Zambia. Further that an administrative decision of a public body cannot be impugned by way of Petition but by way of judicial review. It was stated that in view of the foregoing reasons the action was an abuse of the Court process and this was a proper case to dismiss with costs to the 2nd Respondent.

3. 1ST RESPONDENT'S CASE

3.1 In responding to the Notice to Raise a preliminary issue the 1st Respondent stated that they are in support of the motion to dismiss the Petition on the basis of want of jurisdiction. In their skeleton arguments the focus was to mainly challenge the Petitioners assertion that there had been a contravention of Article 72 (2) and (4) of the Constitution which determination should be dealt with by the Constitutional Court. It was submitted that pursuant to Articles 1 (5) and 128 (1) of the Constitution it is the Constitutional Court that has the jurisdiction to deal with Constitutional matters.

3.2 It was submitted further that it is a principle of law that the mode of commencement of an action is governed by statute and not by the reliefs that are being sought. The case **New Plast Industries v Commissioner of Lands and the Attorney General (2001) ZR 51** was cited as an authority. It was submitted that the High Court's jurisdiction to hear constitutional matters is restricted to hearing

violations relating to the Bill of Rights under Part 3 of the Constitution.

3.3 Further, it was submitted that in the case of **JCN Holdings Limited v Development Bank of Zambia (Appeal No. 87/2012)** the Supreme Court settled the principle that where a matter is not properly before a court that court has no jurisdiction to make any orders or grant any remedies. The case of **Chikuta v Chipata Rural Council** was affirmed.

3.4 In addition it was submitted that in the case of **Kabisa Ngwira v National Pension Scheme Authority (2019/CCZ/17)** the Constitutional Court pronounced itself on the proper mode of commencement of constitutional challenges before it which is by way of petition. Further, in the case of **Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick (2020/CCZ/A002)** the Constitutional Court stated that it was a specialized Court established to deal with constitutional matters.

3.5 It was submitted that the High Court does not have jurisdiction to determine the alleged contraventions or violations of the Constitution of Zambia as the correct court to deal with them is the Constitutional Court. It was prayed that the Petition be dismissed with costs.

4. PETITIONERS CASE

- 4.1 In opposing the application the Petitioners filed into Court an affidavit in opposition, deposed to by the 1st Petitioner and list of authorities and skeleton arguments.
- 4.2 In the Affidavit in support it was averred that the deponent by advise from his lawyers was informed that there was no Regulation 19(7) of the Electoral Process (General)(Amendment) Regulations, 2021. That what was relied upon was Regulation 18(7) of the Electoral Process (General)(Amendment) Regulations, 2021.
- 4.3 It was further averred that on advise from his advocates the deponent believed that the said regulation is to be read together with Article 52(4) of the Constitution. And if so read then the correct mode of commencement is by way of Petition.
- 4.4 It was stated that the Petition currently before the Court is not challenging the successfully filed nominations but challenging the rejection of the Petitioners nominations by the returning officer.
- 4.5 It was also stated that the matter before the Constitutional Court was for purposes of interpretation while the current petition is dealing with the rejection of the nominations filed by the Petitioners. It was affirmed that the Petition before the Court was in no way inviting the Court to interpret the Constitution of Zambia. It was averred that the deponent was of the firm belief that the High Court was the one that deals with the rejection of the nominations by the Electoral Commission of Zambia with regards to the by election

which is in reference to Regulation 18 (7) of the Electoral Process (General)(Amendment) Regulations, 2021.

4.6 In the list of authorities and skeleton arguments in opposition it was first argued that the State could not move the Court on a preliminary issue by way of Orders 14A and 33 Rule 3 of the Rules of Supreme Court.

4.7 It was argued in the alternative in opposition to the arguments in support of the application firstly that the **Court has jurisdiction to determine the petition**. It was first pointed out that the Regulation 19(7) pointed out in the arguments by the Attorney General is a non-existent provision. It was then submitted that the correct reference ought to have been to Regulation 18(7) which provides that

“(7) The determination of the returning officer that a nomination is valid or invalid is final unless challenged through an election petition in accordance with Article 52 (4) of the Constitution.”

4.8 It was submitted that the foregoing provision is clear that a person aggrieved by a decision of the returning officer, in relation to the validity or invalidity of a nomination is required to commence proceedings by way of an election petition. It was further submitted that the High Court is the court in which the Petition ought to be commenced. Article 52(4) of the Constitution was quoted to emphasise this point.

4.9 In responding to the argument that the current petition is not an election petition reference was made to the Nigerian case of **Obasanya v Babafemi (2000) 15 NWLR (PT689)** wherein it was stated that

“Election petition basically complain about elections or conduct of elections”

4.10 It was submitted that conducting of elections by the 1st Respondents starts from the process of nominations right upto the voting day. Further, it was stated that the form of the documents before the court does not matter unless the substance of it is improperly before Court. Reliance was placed on the case of **Munir Zulu v Pilila Gertrude Mwanza (2021/CCZ/009)** in demonstrating that the Constitutional Court in that case had guided where the correct forum lay in respect of challenges to nominations filed for purposes of various elections. It was submitted that the Constitutional Court found that the High Court was the correct forum to hear matters under Article 52 (4).

4.11 It was submitted that in view of the foregoing the first question ought to be dismissed.

4.12 Regarding the question of **the court’s jurisdiction to determine the petition in the absence of any challenge of the nominations of a successful candidate by a third party** it was submitted that the reference to “a person” in Article 52 (4) does not refer to a third party. It was submitted that the definition of “any person” is contained in Article 266 of the Constitution which provides that

“person means an individual, a company or an association of persons, whether corporate or unincorporate”

4.13 It was submitted that the argument that only a third party can bring a petition under Article 52(4) is inconceivable and misplaced and ought to fail.

- 4.14 On the issue whether an administrative decision of a public body can be impugned by way of a petition instead of judicial review it was argued that commencement of actions in civil jurisdiction are generally commenced by writ of summons unless the law expressly provides. The case of **Chikuta v Chipata Rural Council** (supra) was relied upon.
- 4.15 It was submitted that in this case Regulation 18(7) of the Electoral General Regulations as read with Article 52 (4) is very clear regarding the mode of commencement, that it is by way of petition. It was stated that to argue that the matter should be brought before the court by way of judicial review is tantamount to an argument that the exiting provisions of the Regulations and the Constitution should be ignored.
- 4.16 Pertaining to the issue whether **the Court has jurisdiction to interpret the Constitution of Zambia in light of Article 128(1)(a)** it was argued that a perusal of the reliefs sought before this Court in no way seek this Court's interpretation of the provisions. It was submitted that Article 128 (1) (a) does not apply to the case at hand therefore the ground is incompetently before the Court.
- 4.17 With regard the question whether this action is an abuse of the Court process by reason of duplicity as the issues canvassed in the Petition are similar to those brought before the Constitutional Court, in particular reliefs (a), (b) and (d) it was argued that the reliefs being sought in this Court were not founded on interpretation. In so submitting the issues raised before the Constitutional Court were itemized and the determination of the Constitutional Court was stated as at page 9. The crux of which was to state that only question 4 was properly before them as it solely sought the Court to interpret Article 72.

4.18 It was submitted that in the case of **Development Bank of Zambia and 2 others v Sunvest Limited and another (1995 – 1997) ZR** the Court stated that :

“Multiplicity of actions is understood to refer to a situation where parties to an action institute parallel proceedings over the same or substantially the same subject matter before different courts.”

4.19 Further, reference was made to the case of **BP Zambia v Interland Motors Limited (supra)** to show that a party should not be allowed to deploy his grievances piecemeal, in scattered litigation. It was submitted that in the petition before the Constitutional Court the only issue that arose for consideration was regarding the interpretation of what was meant by causing a vacancy in the National Assembly under Article 72 of the Constitution.

4.20 It was submitted that the argument regarding abuse of the Court process was strange and incompetent.

4.21 Finally in relation to the prayer for the matter to be dismissed with costs it was submitted that the Petitioners having demonstrated that the questions by the 2nd Respondent sought to be determined by the Court lack merit the matter ought not to be dismissed.

4.22 It was prayed that the application be dismissed entirely with costs to the Petitioner.

5. ORAL ARGUMENTS

5.1 At the hearing, the learned Solicitor General on behalf of the 2nd Respondent confirmed that the State had not filed any arguments in reply to the Petitioner's filed

arguments but that they would proceed to respond orally. He relied on the notice of motion, affidavit in support and skeleton arguments in support of the preliminary issue.

5.2 The learned Solicitor General submitted that he wished to augment what he summed up to be 3 substantive issues. Notably, on jurisdiction; abuse of court process and; inaptness of the reliance on article 52 (4) of the Constitution. He submitted as a starting point, on what he referred to a house keeping issue, the Petitioners argument questioning the competence of the 2nd Respondent's preliminary issue in using Order 14A and Order 33 rule 3 of the RSC in a matter commenced by petition.

5.3 It was State Counsel's submission that the cited orders do apply to petitions as well. That this issue was dealt with in the case of **LAZ vs President of the Republic of Zambia, Attorney General and the National Assembly petition No 13 CCZ of 2019** where a similar issue was raised and dismissed for want of merit. That the court definitively held that these provisions do apply and hence the preliminary issue was properly before the court.

5.4 Moving on to the 3 identified general issues starting with the jurisdictional question, State Counsel submitted that the court would

quickly note that the matter before the court alleges that the 1st Respondent violated or contravened the Constitution. Further that the action or decision taken by the 1st Respondent to reject the nomination papers of the Petitioners was not only excessive but based on a serious misapprehension of article 72 (2) and 72 (4) of the Constitution.

5.5 The learned Solicitor General submitted as trite that matters to do with contravention or interpretation of the Constitution are beyond the jurisdiction of this court. That this court is guided and bound by the Supreme Court judgment in the case of **Hakainde Hichilima Vs AG Appeal No. 4 of 2019** in which the court confirmed that the Constitutional Court has the mandate under article 128 to interpret the entire Constitution . It was submitted further that the final jurisdiction in matters relating to claims of contravention of the Constitution is conferred on the Constitutional Court. It was therefore argued that this court has no jurisdiction to determine the issues at play in this matter.

5.6 It was pointed out in the second limb of arguments as worth noting, that the Petitioners took the same issues in articles 72 (2) & (4) to the Constitutional Court for interpretation in the case of **Joseph Malanji and Bowman Lusambo** under cause numbers 2022/008 CCZ. It was the

State's contention that the Petitioners ought to have combined the reliefs that they seek in this court in the action commenced in the Constitutional Court as opposed to deploying their grievances piece meal in scattered litigation and hauling the same opponents over the same issues in different courts. Reliance was placed on the case of **BP Zambia Limited vs Interland and Masauso Zulu vs Mwaiseni Stores 1982 (ZR) 172** as authority for this proposition.

5.7 Also called in aid was the case of **KELVIN HANG'ANDU AND COMPANY (A firm) V WEBBY MULUBISHA (2008) ZR 288** that frowned upon forum shopping held to be an abuse of court process. State counsel thus submitted that the petition ought to have been filed in the Constitutional Court to address the interpretation now sought as well as the relief of certiorari assailing the decision of the 1st Respondent.

5.8 In the third head, the learned Solicitor General submitted on what he concluded to be the inaptness of article 52 (4) to the present matter. The court was referred to the case of **Munir Zulu Vs Gertrude Mwanza (2021) CCZ 2029** in which the Constitutional Court held that a petition challenging the nomination of a candidate lies with the High Court. He asked the court to consider the question whether there is a challenge

against the nomination of a candidate in the present petition. He firmly suggested that the answer would be a resounding no. It was submitted further that this court has had occasion to deal with petitions that fit in the straight jacket of article 52 (4) that include among others, the case of **Janes Mwanyinda Yamunima vs Mulusa Mulabuki** 2021 (HP/0623).

5.9 That the cases are distinguishable from the matter before this court in the sense that these matters dealt with a challenge against the nomination of a candidate. Instead that what the court is presently faced with is a challenge against the rejection of the nomination papers based on what the Petitioners contend was a misapprehension of article 72 (2) of the Constitution which is a totally different issue from challenging nomination.

5.10 It was the Solicitor General's submission therefore, that this petition does not fit into the straight jacket of article 52 (4) of the Constitution that the High Court has been given the jurisdiction to deal with. That the Petitioners lost their opportunity which they should have grasped, to file a petition before the Constitutional court in which they would have presented a claim for the reliefs now sought.

5.11 State Counsel invited the court to take judicial notice of the fact that the Petitioners had filed a petition before the Constitutional Court but withdrew it. It was argued that it is not the role of the court to render judgments on sympathetic grounds. It was argued further that there was no provision under article 52 (4) for the court to deal with the rejection of a nomination.

5.12 Reliance was placed on the case of Matilda Mutale vs Emmanuel Munaile in which the court held that a petition is used in cases where it is required by a particular statute or rule. State counsel submitted that there is no authority for invoking a petition before this court in respect of a rejection of a nomination.

5.13 The learned Solicitor General submitted further that the alternative course of action was for the petitioner's to have commenced their action by Judicial Review seeking as they now do an order of certiorari to quash the decision frowned upon. That they have done neither but opted instead to go on a voyage of discovery. He prayed that the matter be dismissed with costs.

5.14 Mr. Simachela the learned Chief State advocate adopted the submissions of the learned Solicitor General. He referred the court to the

case of Owners of Motor Vessel Lillian vs Caltex Oil Kenya Ltd (1989) KLR in which the court held that jurisdiction is everything. That the court went further to state that without jurisdiction, the court has no power to take any further step. He argued that the State had ably demonstrated in that regard that the court has no jurisdiction. Further reliance was placed on the case of JCN holdings vs Development Bank of Zambia appeal No. 27 of 2012 to cement the State's position on the jurisdictional question. He reiterated the prayer for dismissal of the matter.

5.15 Mrs. Phiri learned counsel for the 1st Respondent relied on the submissions in support of the preliminary issue dated 9th September 2022. She added that in paragraph 19 of the petition, the Petitioners had expressly stated that they are alleging contravention of the Constitution. Further that paragraph 4-18 are also alleging contravention of the Constitution. On that premise, it was the 1st Respondent's submission that this matter is fit for determination by the Constitutional court. She echoed the submission for dismissal of the petition with costs.

5.16 Leading the Petitioners submissions in opposition, learned counsel Mr. M. Zulu referred the court to regulation 18 (7) of SI Nc 63 of 2016

which he argued gives the mandate to the court to hear the petition before the court. He submitted that what has been brought before the court is a determination of whether the decision of the returning officer was valid by reason of article 72 (4.)

5.17 On the issue of abuse of process, Mr. Zulu argued that there is no abuse apparent. That what was before the Constitutional Court was the interpretation of article 72 (4) after a media statement issued by the 1st Respondent. However, that what is before this court is the challenge of the decision by the returning officer that concluded that the nomination of the Petitioners was invalid.

5.18 Counsel submitted that the Petitioners took the issue of interpretation of article 72 (4) to the Constitutional court, which was done. It was argued that this court was thus not being called upon to interpret the provision but to implement it as interpreted. It was submitted that the question of abuse therefore falls away as regulation 18(7) has answered the issue relating to the extent and application of article 52 (4).

5.19 Mr. J. Zimba in supporting the arguments added that the framers of the Constitution and article 52 (4) were mindful of circumstances in

which there might be a rejection of a nomination. That this was why regulation 18 (7) of the electoral process rules quickly kicks in.

5.20 Regarding the issue of the prayer for certiorari, Mr. Zimba argued that the issue at play was a challenge of the decision of a returning officer. As such that a challenge is only properly launched at close of nomination and within 7 days of such closure. Learned counsel argued that it was the Petitioners position that there is a challenge before the court and that it came within the prescribed time. That the facts in this case are thus distinguishable from the cases relied upon by the Respondents. He submitted that the preliminary issue therefore lacked merit and should be dismissed.

5.21 Mr. Chirwa supplemented the submissions. He argued that the Petitioners were not asking the court to interpret any part of the Constitution but rather to rectify a breach of the Constitution. He restated the Petitioner's reliance on regulation 18 (7) and the *Munir Zulu* case at page J17 in which the court held that the petition under article 52 (4) deals with "particular challenges" to nominations. Thus that article 54 (4) as read with regulation 18 (7) of the regulations makes any argument challenging jurisdiction a closed issue.

5.22 Mr. T. Ngulube more or less repeated the same submissions and added that the court has unlimited jurisdiction to deal with any matter arising out of article 52 (4). He submitted that the wording of article 28 of the Constitution grants the jurisdiction to the High Court. Reference was made to the cases of Jere v Ngoma 1969 (ZR), Phiri vs Banda (1979) ZR P90 that describes the power of the court where there is a vacuum. Counsel concluded that the court can still quash the decisions of the returning officer in spite the fact that judicial review was not the mode of challenge adopted.

5.23 In his submissions in reply, the learned Solicitor General argued that the Petitioners had conceded that there is a lacuna in article 52 (4). It was counsel's submission that the court cannot go outside the confines of the article. That regulation 18 (7) talks about an election petition. He questioned whether what was before the court is an election petition and suggested that it was not. He reiterated the State's position that article 52 (4) does not deal with rejection of nomination.

5.24 He maintained that this petition was about a claim of contravention of article 72 (2) and (4) and the court has no jurisdiction to

hear such a matter as article 128 of the Constitution confers such authority to the Constitutional Court.

5.25 He argued further that under article 52 (4) the subject person of the contested nomination cannot move the court and this is done by a third party. He reiterated the State's prayer that the matter be dismissed.

6.0 Has the preliminary issue been properly raised?

The question of the incompetence of the 2nd Respondent to raise the preliminary issue pursuant to Order 14 A and Order 33r3 of the Rules of the Supreme Court was not pursued with any vigor by the Petitioners. Suffice to state, their filed argument suggest that order 14/A/2/2 precludes "the Crown" and by necessary extention "the State" in our jurisdiction, from raising a preliminary issue pursuant to order 14 A. Further reference was made to the case of John **Sangwa vs Sunday Bwalya Nkonde SC (Appeal No.2/2021)** to argue that the court specifically ruled that order 33 rule 3 cannot be used in a matter commenced by petition.

It will be noted that order 14A/2/2 makes cross reference to order 77 rule 7 of the Rules of the Supreme Court. The explanatory notes appear to suggest what is contemplated are applications for summary judgments. Further, properly

read the **Sangwa v Nkonde** case did not wholesomely suggest Order 33 rule 3 can never be resorted to by the State. Thus at J41 the court observed that:

“On the facts in this case which show that the action was commenced by a petition under article 28, a preliminary issue raised under Order 14 A as read with Order 33 rule 7 of the white book, and there being no opposition filed by the judge, it was a misdirection on the part of the High Court when it found the preliminary objection to be on firm ground and the court of Appeal when it refused to consider the propriety of the preliminary objection to be on firm ground and the Court of Appeal when it refused to consider the propriety of the preliminary objection.

The decision we have reached in the preceding paragraph is by no means a suggestion that in any obviously deserving cases, the High Court banned to proceed to such trial for a full hearing. Where for instance, a petition under the bill of Rights is so flawed or a wrong party named, we see no reason why the High Court cannot hear an interlocutory objection and spare the aggrieved party unnecessary costs by halting the proceeding against the party at interlocutory stage.” Emphasis ours.

The holding of the Supreme Court therefore renders it possible to consider such application notwithstanding it was commenced by petition.

The learned Solicitor General also made reference to the case of **LAZ vs President of the Republic of Zambia AG and Nass CCZ/13/2019** to argue

that the court considered a similar objection and dismissed the application for want of merit. We have perused the decision and it does not appear to have the holding referred to. Suffice to state we are satisfied that there is nothing objectionable about the manner the preliminary issue has been raised and we proceed to consider it accordingly.

7. 0 PRELIMINARY ISSUES

7.1 From the written and oral arguments submitted before the Court it is clear that this Court is being invited to consider three main issues being:

- (a) **Jurisdiction** of the Court to consider the Petition before it. Encapsulated in this head is the issue relating to interpretation of the Constitution under Article 128(1)(a) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and the application of Article (52)(4) as read with Regulation 18 (7) of the Electoral Process (General)(Amendment) Regulations, 2021 and whether the petition before the Court amounts to an election petition;
- (b) **mode of commencement** of the action; and
- (c) **Abuse of the Court** process in relation to multiplicity of actions.

7.2 Jurisdiction of the Court

7.2.1 It has been submitted by the 2nd Respondent and supported by the 1st Respondent that interpretation of the Constitution is a preserve of the Constitutional Court save for provisions under the Bill of Rights. A plethora of authorities are cited. It must be stated from the onset that the Petitioners have not challenged this trite position of the Law as contained in Article 128 (1) of the Constitution. The specialized nature of the Court is of agreed knowledge and requires no belabouring. The said Article 128 provides as follows:

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—

(a) a matter relating to the interpretation of this Constitution;

(b) a matter relating to a violation or contravention of this Constitution;

(c) a matter relating to the President, Vice-President or an election of a President;

(d) appeals relating to election of Members of Parliament and councillors; and

(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

(2) Subject to Article 28 (2), where a question relating to this Constitution arises in a court, the person presiding in that court

shall refer the question to the Constitutional Court.

(3) Subject to Article 28, a person who alleges that—

(a) an Act of Parliament or statutory instrument;

(b) an action, measure or decision taken under law; or

(c) an act, omission, measure or decision by a person or an authority;

contravenes this Constitution, may petition the Constitutional Court for redress.

(4) A decision of the Constitutional Court is not appealable to the Supreme Court.

7.2.1.1 One of the challenges of the Petitioners in their Petition before this Court relates to the claim that the Returning officer in rejecting their nominations violated the provisions of Article 72 (4) of the Constitution. In that regard they seek the declaration of this Court that the acts of the Returning officer were illegal, procedurally improper and therefore null and void. A perusal of the Petition shows that the Petitioners are aggrieved with the decision of the returning officer to reject their nominations on the basis of their

being disqualified to stand pursuant to Article 72 (4) of the Constitution. It is on that basis that they seek this Court to make a declaration that Article 72 (4) of the Constitution has been violated by the returning officer.

7.2.1.2 Now as can be seen from the Article 128 (1) (b) of the Constitution the plain, clear and simple wording there is that a matter relating to the “violation” or “contravention” of the Constitution is the preserve of the Constitutional Court to hear. As rightly stated in the case of **Hakainde Hichilema v Attorney General** (supra) subject to Article 128 the Constitutional Court has the mandate to interpret the entire Constitution.

7.2.1.3 In that regard in so far and the Petitioner seeks to have the High Court make a pronouncement regarding the contravention of Article 72(4) of the Constitution, the High Court has no such jurisdiction, as this is clearly the preserve of the Constitutional Court.

7.2.1.4 Be that as it may the Petition of the Petitioners and the Affidavit in opposition to the Notice to raise a preliminary issue is clear that the Petitioners seek to challenge the action of the Returning Officer in rejecting the nomination. This challenge is raised pursuant to Article 52 (4) of the Constitution. The

said provision, for the avoidance of doubt provides that:

“(4) A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twentyone days of its lodgement”

7.2.1.5 The parties have both cited the recent case of **Munir Zulu v Pilila Gertrude Mwanza** (supra) where the Constitutional Court held that the jurisdiction of hearing challenges relating to nominations under Article 52 (4) lies with the High Court. As has been demonstrated by the Petitioners, life and purpose is given to this provision of the Constitution by Regulation 18 (7) of the Electoral Process (General) (Amendment) Regulations, 2016 promulgated under the auspices of the Electoral Process Act of 2016. That provision of the law makes a direct cross – reference to the employment of Article 52 (4) where the determination of the returning officer regarding the invalidity or validity of a nomination is brought into question. This provision alone is clear and unambiguous. In the case of **Hakainde Hichilema v Attorney General** (supra) the Supreme Court stated as follows at page 76:

“When a provision of the Constitution or any other enactment is made ‘subject to’ another provision, it entails that such provision shall yield to the other provision to which it is made subject”

7.2.1.6 The guidance above from the Supreme Court as well as the decision in the Munir case therefore goes to demonstrate that the High Court has the

jurisdiction to determine an election petition brought under Article 52 (4) of the Constitution.

7.2.1.7 In fact, Constitutional Court in the *Munir Zulu v Pilila Mwanza* stated that the provisions of Article 128 (3) could not be read in isolation of Article 52(4).

7.2.1.8 Regarding whether this constitutes an election Petition the answer can be drawn from Regulation 18 (7) from where the Court draws its firm jurisdiction. In that provision it is stated that the petition which emanates from that provision of the Regulation is an “electoral petition”. It can be noted that from that provision the issue is clearly one of relating to nomination, endorsing the position held by the Petitioner that the nomination process forms part of the electoral process therefore brings any dispute arising therefrom falls within the purview of Article 52(4). In that regard the Petition before the Court can properly be described as an election petition.

7.2.1.9 In view of the foregoing it is our considered view that this Court has the jurisdiction to consider the dispute that has arisen under Article 52(4) of the Constitution.

7.2.2 Mode of Commencement of Action

7.2.2.1 The challenge under this head is that the Petitioners have chosen a wrong mode to commence the action before this Court by choosing to go by way of petition. It has been pointed out that as this matter arises out of an administrative

action the matter ought to have been commenced by way of Judicial Review. The response by the Petitioners is that the mode of commencement of this action is prescribed by law.

7.2.2.2 It has already been found that this matter is anchored in Article 52 (4) of the Constitution as read with Regulation 18(7) of the Electoral Process (General) (Amendment) Regulations. That provision clearly states that the mode of commencement is by way of Petition. As has been positioned by all the parties in the case of **Chikuta v Chipata Rural Council** (supra) the mode of commencement may be provided by statute. This is a notorious principle of law that requires no belabouring. In that regard we find that the Petitioners adopted the correct mode of commencing the action before this Court of competent jurisdiction.

7.2.3 Abuse of the Court Process.

7.2.3.1 It has been submitted that this matter is an abuse of the Court process as the Petitioners had brought a similar action before the Constitutional Court – with the same parties and the same questions. It must be stated from the outset that this Court has taken judicial notice of the abridged judgment of the Constitutional Court under Cause 2022/CCZ/ and is fully aware of the circumstances of that case as is contained therein.

7.2.3.2 The question this Court must determine is whether the actions of the Petitioners in moving the Constitutional Court and the High Court regarding issues emanating from the decision of the Electoral Commission of Zambia to reject their nominations amount to an abuse of the Court process.

7.2.3.3 Abuse of court process can be described as “**the improper use of the judicial process by a party in litigation, aimed on targeting on interference with due administration of justice**”. Order 18 rule 19 of the Rules of the Supreme Court of England and Wales is instructive on what constitutes abuse of process. Clearly each case must be considered on its circumstances before the Court can arrive at a decision whether there has been an abuse of the Court process.

7.2.3.4 Under the circumstances of this case where the Petitioners were seeking different remedies of the Courts which have distinct and separate jurisdictions can it be said that there was an abuse of the Court process. It is clear from the decision of the Constitutional Court that the only issue that was considered there was the issue of interpretation of Article 72 (4). Without delving into the detail of the case it is apparent from the abridged judgment that the Court found that it was not in a position to consider the other questions there and proceeded to consider the issue of interpretation.

7.2.3.5 Before this Court the Petitioners have invoked the dispute resolution mechanism contained in Article

52(4) of the Constitution as read with the Regulation 18(7). They are seeking a decision over the action of the Returning officer.

7.2.3.6 We find that the circumstances before this Court and those that presented themselves before the Constitutional Court can be and should be distinguished. In that regard it cannot be said of the Petitioners that they are abusing the process of the Court. The issue raised by the 2nd Respondent fails.

7.2.3.6.1 In view of the foregoing the following are the findings of the Court:

- a) Regarding the declaration of the actions of the returning officer in contravention of Article 72 (4) this Court has no jurisdiction to interpret the legality or illegality of the action.
- b) Regarding the jurisdiction of this Court under Article 52 (4) this Court has the jurisdiction to hear the challenge that has arisen therein.
- c) Regarding the mode of commencement – the action is properly commenced before this Court by way of petition.
- d) Regarding abuse of process there is none.

7.3 In totality we find that the application by the 1st Respondent is misconceived at law. The High Court, under Article 52 (4) of the Constitution is the Court clothed with jurisdiction to hear election petitions with regard parliamentary candidates. The Application is therefore dismissed.

8 STAY

8.1 As regards the second application, the Petitioners have filed an application to suspend and or stay the by-elections for the Kwacha and Kabushi Constituencies which are scheduled to be held on Thursday 15th September, 2022, pursuant to *Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*.

8.2 The affidavit in support of that application, is deposed to by the 1st Petitioner, Joseph Malanji, in which he has given a background to the petition, stating that himself and the 2nd Petitioner contested as Parliamentary candidates in the Kwacha and Kabushi constituencies in Kitwe and Ndola respectively in the August, 2021 general elections, under the Patriotic Front (PF) ticket, and they emerged victorious. He further avers that the losing candidates in the elections petitioned them and the Constitutional Court nullified their seats.

8.3 It is also deposed that following the nullification of the Petitioners' parliamentary seats, the 1st Respondent set 15th September, 2022 as the date for the Kwacha and Kabushi constituency by-elections, and it also set 25th August, 2022, as the date for filing of nominations by the various candidates who wished to participate in the elections. The averment is that the PF, by a letter dated 21st August, 2022, adopted the Petitioners

as its' candidates for the said Kwacha and Kabushi constituency by-elections.

8.4 Thus, on 25th August, 2022, the Petitioners filed their nomination papers with the Returning Officers, who are the 1st Respondent's agents, and which agents informed them that they were unsuccessful owing to the fact that their elections were nullified by the Constitutional Court of Zambia. Exhibited as 'JM1' to the affidavit, are the nomination and rejection papers. The 1st Petitioner also deposes that on 30th August, 2022, the Petitioners filed the petition before this Court.

8.5 His averment is that as the by-elections are set for 15th September, 2022, there is likelihood that by that time, the petition may not have been heard and determined. The 1st Petitioner also goes further to make averments to the affect that this may result in deprivation of their right to participate in the forthcoming elections in the Kwacha and Kabushi constituencies, thus the said elections should be suspended. Further in averment, the 1st Petitioner states that himself and the 2nd Petitioner will suffer great prejudice should the Court decline to grant the application and will render the petition an academic exercise.

8.6 These last averments alleging deprivation of the right to participate in the by-elections and any prejudice alleged as likely to be suffered are legal arguments which are proscribed by *Order 5 Rule 15 of the High Court Rules, Chapter 27 of the Laws of Zambia*, which provides as follows:

"15. An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion".

8.7 *Order 5 Rule 16 of the said High Court Rules* provides for what should be contained in an affidavit. It states that:

“16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true”.

8.8 The offending paragraphs, being paragraphs 12, 13, and 14 of the affidavit, are accordingly expunged from the affidavit.

8.9 The Petitioners’ arguments as contained in their List of Authorities and Skeleton Arguments is that *Order 3 Rule 2 of the High Court Rules* empowers this Court to make any interlocutory Order which it considers necessary for doing justice, and that *Section 57 of the Electoral Process Act No 35 of 2016* empowers the 1st Respondent to postpone the polling date for a by-election. Their view is that the said provision of the law as read with *Article 52 (4) of the Constitution* entails that whenever there is a challenge to a nomination, the election ought to be suspended immediately.

8.10 Reliance is placed on the case of *Hakainde Hichilema v The Attorney General SCZ No 4 of 2019* stating that it was held in that case, that the Court has power to grant interim reliefs in a petition. Citing the case of *Sonny Paul Mulenga and Vismer Mulenga (both personally and trading as SP. Mulenga International) and Chainama Hotel Limited and Elephants Head Hotel v Investrust Merchant Bank Limited SCZ Judgment No 15 of 1999*, the Petitioners’ argument is that the application has high prospects of success, and it is necessary to postpone the by-election in the interests of justice.

8.11 Also relied on in that regard, is *Odgers on Civil Court Action, 24th Edition* at page 460, paragraph 24.47 where it states that:

“Although the Court will not without good reason delay a successful Plaintiff in obtaining the fruits of his judgment, it has power to stay execution if justice requires that the defendant should have this protection.

8.12 The case of *Michael Chilufya Sata v Chanda Chimba III ZNBC, Muvi TV Mobi TV International Limited 2011 Vol 2 ZR* is also relied on as authority.

8.13 In response to the application, Bob Mwelwa Musenga, the Acting Chief Electoral Officer, in an affidavit in opposition which was filed on 9th September, 2022, deposes that the power to set the place, time and date when a by-election is to be held, is a Constitutional mandate of the 1st Respondent. Further, that the Constitution provides that elections must be held within ninety (90) days of the occurrence of a vacancy in the office of Member of Parliament. He further deposes that in line with the Constitution, a Statutory Instrument was promulgated, which set the date for the by-election as 15th September, 2022 for the Kwacha and Kabushi constituencies.

8.14 He avers that four (4) candidates successfully filed their nominations in the Kabushi constituency, while five (5) filed for the Kwacha constituency. The contention is that nominations for the two (2) Petitioners before Court were rejected in line with the law. The other averments are legal arguments relating to prejudice that a stay of the elections will occasion, and that it will deprive the people of Kwacha and Kabushi of representatives in the National Assembly and which

offend *Order 5 Rule 15 of the High Court Rules* as noted above, and the said offending paragraphs are accordingly expunged from the affidavit.

8.15 In the Skeleton Arguments, *Article 57 (3) of the Constitution* is cited as giving the 1st Respondent power to set the date, place, and time of a by-election, as well as *Section 28 of the Electoral Process Act*. *Section 57 of the Electoral Process Act* is also cited, which gives the 1st Respondent power to postpone a by election. Relying on the case of *Attorney General v E.B Jones Machinists Limited SCZ No 26 of 2000* the argument is that the 1st Respondent cannot be estopped from performing its' statutory functions.

8.16 The 1st Respondent has also relied on the case of *Nyampala Safaris (Zambia) and four others v Zambia Wildlife Authority and six others SCZ/8/79/2003* stating that it held that a stay of execution is granted on good and convincing reasons.

8.17 The 2nd Respondent by an affidavit in opposition deposed to by the Solicitor General, states that this Court set tight orders for directions with a view to conclude the matter before 15th September, 2022, the date set for the by-elections. He also avers that as shown by exhibit 'MM1' the abridged Ruling of the Constitutional Court, the Petitioners applied for a stay of the electoral process before that Court. He also makes legal arguments to the effect that the main matter has no prospects of success, and that it an abuse of the Court process. The paragraphs making those averments are accordingly expunged from the affidavit.

8.18 In the 2nd Respondent's Skeleton Arguments, the case of *Nyampala Safaris* also cited by the 1st Respondent is cited, to emphasise that a stay

of execution is granted on good and convincing grounds. Also relied on, is the case of *James Mwanyanda Wamunyima v Walusiku Mulaiki 2021/HP/0623* stating that Hon Mrs Justice E. Mwikisa's decision in that case, was cited with approval in the case of *Mwanza Pilila Getrude Jere, Macdonald Phiri, Zelipa Chisulo v Munir Zulu and the Electoral Commission of Zambia 2021/HP/EP/0047*.

8.19 The 2nd Respondent also relies on the case of *Joseph Malanji and Bowman Lusambo v the Attorney General and the Electoral Commission of Zambia 2022/CCZ/0017*, stating the Court in that matter, noted that while the Petitioners had argued that they would be politically ruined as even if they were successful in the main matter, the nominations and elections would have passed thereby rendering the matter an academic exercise, the Court was of the view that the matter would have been determined before the said elections, and therefore the Petitioners would not be prejudiced.

8.20 The case of *Sonny Mulenga* cited by the Petitioners, is also cited as authority for the principle that when granting a stay of execution, the prospects of success of an appeal should be previewed.

8.21 In an affidavit in reply which was filed on 9th September, 2022, the 1st Petitioner deposes that he has been advised by his advocates that the stay of execution sought before this Court is different from the one that was sought before the Constitutional Court, as that one sought stay of the nominations, while this one is to stay the elections.

8.22 At the hearing, Counsel for the Petitioners, Mr Makebi Zulu, stated that they relied on the documents that they had filed in support of

the application on 7th September, 2022. In augmenting, he submitted that Article 52 (4) of the Constitution envisages that where there is a challenge to the validity or otherwise of any nominations, there should be a process of dispute resolution which must be filed within seven (7) days of the close of nominations, and which must be determined within twenty one (21) days of lodgment, and thereafter, an election to be held within thirty (30) days.

8.23 He stated that the Petitioners had challenged the nomination within the period of the elections, and if a stay of the elections was not granted, the petition would be rendered otiose. Counsel further stated that the jurisdiction to stay is inherent by reason of Article 52 (4) of the Constitution. He concluded by stating that only three (3) days remained before the election, and prayed that the stay be granted.

8.24 Counsel for the 1st Respondent, Mrs Theresa Phiri, submitted that they relied on the affidavit in opposition and Skeleton Arguments. She added, reiterating the argument that granting a stay would usurp the 1st Respondent's mandate as stipulated in Article 57 (3) of the Constitution, and it was therefore untenable at law. Counsel also stated that Section 57 of the Electoral Process Act, while providing two (2) grounds on which the 1st Respondent can postpone a by-election, those grounds do not include the fact that a candidate did not file nominations papers or that they were rejected.

8.25 Further, that Article 52 of the said Constitution provides for cancellation of an election, and not a stay, and she stated that the Petitioners would not be prejudiced by a stay of the elections not being granted as Section 98 of the Electoral Process Act provides for petitions.

- 8.26 The learned Solicitor General on behalf of the 2nd Respondent stated that they had also filed an affidavit in opposition and Skeleton Arguments on which they relied, stressing that the Petitioners had made a similar application before the Constitutional Court. It was stated that the stay should not be granted as the petition would be determined before the by-elections were held.
- 8.27 Counsel for the Petitioners Mr Makebi Zulu in reply, stated that the application was not meant to usurp the powers of the 1st Respondent. With regard to the Learned Solicitor General's submissions, the reply was that if there is prejudice, a stay should be granted, noting that cancellation of an election is a mandate that is placed on the 1st Respondent, and who should have by now, cancelled the by-elections following the Judgment of the Constitutional Court. However, as they had not done so, they had been prompted to make the application.
- 8.23 Mr Zimba also on behalf of the Petitioners in reply, stated that the rule of law requires the Courts to check the 1st Respondent, as a separation of powers. He also submitted that the 1st Respondent is part of the Executive and its' actions are subject to being checked by the Judiciary. The prayer was that the stay be granted.
- 8.29 We have considered the application. *Order 3 Rule 2 of the High Court Rules* provides that:
- "2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".*

8.30 This provision of the law empowers the Court to make any interlocutory order in the interests of justice. In this application, the Petitioners seek an order to stay or suspend the by-elections for the Kwacha and Kabushi constituencies which are scheduled to take place on Thursday, 15th September, 2022. As can be seen from the authorities that the parties have cited, a stay of execution will only be granted on good and convincing grounds.

8.31 Further, *Halsbury's Laws of England, 4th edition, Vol 17 at paragraph 455*, states that the Court has absolute and unfettered discretion as to granting or refusing a stay, and as to the terms upon which it will grant it. That as a rule, the Court will only grant a stay of execution if there are special circumstances, which must be deposed to in an affidavit.

8.32 *Order 59/13/2 of the Rules of the Supreme Court of England, 1999 Edition* states that:

"An appeal does not operate as a stay on the order appealed against, except to the extent that the court below, or the Court of Appeal....

Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled", pending an appeal and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from....

But the court is likely to grant a stay where the appeal would otherwise be rendered nugatory, or the appellant would suffer loss which could not be compensated in damages. The question whether or not to grant a stay is

entirely in the discretion of the court and the court will grant it where the special circumstances of the case so require”.

8.33 Thus, the question that arises in this application, is whether the Petitioners have advanced good and sufficient reasons, warranting a stay or suspension of the Kwacha and Kabushi by-elections to be granted? From the Skeleton Arguments that have been filed by the Petitioners, it can be seen that they allege that their petition has prospects of success, and that granting a stay will not prejudice the Respondents, but will in fact serve the interests of justice. It is also their argument that the election date for the by elections in the two (2) constituencies has been set and the elections should be stayed.

8.34 The gist of the 1st Respondent’s opposition is that it is mandated by law to set the date, time and place for by-elections, and that granting the remedy sought by the Petitioners will usurp the 1st Respondent’s statutory mandate. The 1st Respondent’s contention is that the relief sought is untenable at law, and that the Petitioners will not suffer any prejudice as in the event that the by-elections go ahead, as there is provision in the Electoral Process Act to petition an election.

8.35 The 2nd Respondent on the other hand, has argued that the Petitioners made a similar application before the Constitutional Court, and that the Ruling in that matter applies to this case.

8.35 In terms of the arguments advanced by the 1st Respondent that it has the statutory mandate to set the time and place for by-elections, indeed *Article 57 of the Constitution* provides that a by-election shall be held within ninety (90) days of the occurrence of a vacancy in the office of Member of Parliament. Under *sub article (3) of that Article*, the 1st

Respondent is mandated by regulation to set the place, date and time of when a by-election will be held.

8.36 However, *Section 57 of the Electoral Process Act No 35 of 2016* empowers the 1st Respondent to postpone the polling date for a by-election if it is satisfied that:

- a) The postponement is necessary for ensuring free and fair elections; and
- b) The polling date for the election shall fall within the period required by the Constitution.

8.37 Noteworthy is that Article 52 of the Constitution provides for challenge to any nominations for Member of Parliament within seven (7) days of the close of nominations with the Electoral Process (General) Regulations providing the legal framework for the conduct of nominations and stating the manner of challenge of any nominations that are declared. Therefore, there is a dispute resolution mechanism that is provided for in relation to nominations for Member of Parliament, and in the spirit of the 1st Respondent ensuring the conduct of a free and fair election, it is only equitable that the dispute resolution mechanism is exhausted in line with the law should it arise, before a by-election can be held.

8.38 Zambia is a democratic country, and it should be seen to be upholding the tenets of democracy, by ensuring that elections are held freely and fairly.

8.39 As regards the 2nd Respondent's argument that the Ruling of the Constitutional Court applies to this case, it will be noted that the Court in the said ruling which was delivered on 25th August, 2022 in the case *Joseph Malanji and Bowman Chilasha Lusambo v the Attorney General and the*

Electoral Commission of Zambia 2022/CCZ/0017 was on an application to stay the decision of the 2nd Respondent, who is the 1st Respondent herein. That decision was contained in a media statement dated 24th August, 2022, whose effect was that the 1st Respondent would not accept the nominations of candidates who had caused vacancies in the National Assembly as stipulated under Article 72(4) of the Constitution, in which the two Petitioners before that Court and who are in fact the Petitioners before this Court fell.

8.40 The Court noted that the Petitioners who are potential candidates in the 15th September, 2022 by-elections, had submitted that they may be politically ruined in that even if they were successful in the main matter, the nominations would have passed, and the elections would have been equally held, rendering the whole matter academic. The Court opined that the matter before that Court was capable of being determined and concluded way before the elections, and on that basis, it declined to grant the stay.


8.41 Before this Court, is a petition that has been brought pursuant to Article 52 (4) of the Constitution. That Article requires that a petition is heard and determined within twenty-one (21) days of its lodgment. The petition was filed on 30th August, 2022, and the twenty-one (21) days for the hearing and determination would not have elapsed by Thursday, 15th September, 2022 when the by-elections in the Kwacha and Kabushi constituencies is scheduled to be held.

8.42 Further, what is sought to be stayed in this application is the by-elections and not the nominations. Consequently, the considerations that were taken into account when refusing to grant the stay of the 1st Respondent's decision before the Constitutional Court do not apply to this

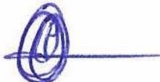
matter, as the circumstances are different. This is because the petition before this Court would not have been heard and determined by the time the by-elections are held.

8.43 In order to avoid any prejudice that may be occasioned to the Petitioners or their petition being rendered academic, we find that this a fit and proper case for the by-elections in the Kwacha and Kabushi constituencies which are scheduled to held on Thursday 15th September, 2022 to be suspended or stayed pending determination of the petition, and we accordingly grant the stay with costs in the cause.

DELIVERED IN CHAMBERS THIS 13th DAY OF SEPTEMBER, 2022


.....
M. D. BOWA
HIGH COURT JUDGE

.....*Kaunda*.....
S. KAUNDA NEWA
HIGH COURT JUDGE


.....
C. LOMBE PHIRI
HIGH COURT JUDGE